

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NICHOLAS SOMBERG,

Plaintiff,

Case No. 19-cv-11917

v.

U.S. District Court Judge
Gershwin A. Drain

JESSICA R. COOPER, in her official
capacity as Prosecutor of Oakland
County, Michigan,

Defendant.

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S
MOTION TO REOPEN CASE AND ALLOW DEFENDANT TO FILE A
MOTION TO DISMISS (ECF No. 27)**

On July 15, 2020, Plaintiff Nicholas Somberg filed the instant action against Defendant Jessica R. Cooper in her official capacity as Prosecutor of Oakland County, Michigan to assert the right to record and photograph "live-streamed" matters of public concern. ECF No. 1. This Court denied Plaintiff's motion for summary judgment but certified his First Amendment question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and administratively closed the case while

Plaintiff pursued his appeal. ECF No. 24. The Sixth Circuit subsequently denied Plaintiff-Appellant's petition for leave to appeal. ECF No. 25.

Presently before the Court is Defendant's Motion to Reopen Case and Allow Defendant to File a Motion to Dismiss (ECF No. 27), filed on September 19, 2022. Plaintiff has responded, indicating that he does not oppose the case being reopened. ECF No. 28, PageID.354. However, Plaintiff argues that it would be improper for Defendant to file a motion to dismiss under Federal Rule of Civil Procedure 12(b) given that she has already filed an answer. *Id.* (citing ECF No. 5). Nevertheless, Plaintiff does not object to Defendant filing a motion for summary judgment under Federal Rule of Civil Procedure 56, which Defendant has not yet done. *Id.* at PageID.354-55.

Upon review, the Court agrees with Plaintiff that it would be procedurally improper for Defendant to file a motion to dismiss at this juncture. *See Fed. R. Civ. P. 12(b)* ("A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed."). Defendant filed her Answer to Plaintiff's Complaint on September 15, 2020. As the Sixth Circuit suggested, the "next step" in this matter is "for the prosecutor's office to move for summary judgment." ECF No. 25, PageID.343.

Accordingly, Defendant's Motion to Reopen Case and Allow Defendant to File a Motion to Dismiss (ECF No. 27) is **GRANTED IN PART AND DENIED IN PART.** Specifically, the request to lift the stay and reopen the case is **GRANTED**, but the request for permission to file a motion to dismiss is **DENIED**.

IT IS SO ORDERED.

/s/ Gershwin Drain
GERSHWIN A. DRAIN
UNITED STATES DISTRICT JUDGE

Dated: October 11, 2022

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on October 11, 2022, by electronic and/or ordinary mail.

/s/ Teresa McGovern
Case Manager